# Re Tio Chee Hing, ex p Chung Khiaw Bank Ltd

HIGH COURT (KOTA KINABALU) — BANKRUPTCY PETITION NO K 259 OF 1992
TEE AH SING JC
22 SEPTEMBER 1995

***Bankruptcy*** *— Notice — Setting aside — Affidavit to set aside bankruptcy notice not disclosing counterclaim, set-off or cross demand — No sufficient cause shown why receiving and adjudication order should not be made — Bankruptcy Act 1967 s 3*

***Bankruptcy*** *— Notice — Setting aside — Procedure — Notice of motion supported by affidavit not filed — Whether affidavit in opposition bad in law — Bankruptcy Rules 1969 r 18*

A bankruptcy notice was served on the judgment debtor on 28 January 1992. On 31 January 1992 the judgment debtor filed an affidavit-in-opposition ('the affidavit') to set aside the bankruptcy notice pursuant to r 95 of the Bankruptcy Rules 1969 on the ground that service the bankruptcy notice was improper and invalid as it was only a certified true copy and not a sealed copy contrary to rr 97 and 109 of the Bankruptcy Rules 1969. The judgment creditor, however, contended that the affidavit should be dismissed on the grounds: (i) that it did not show that the judgment debtor had a counterclaim, set-off or cross demand which equaled or exceeded the amount of the judgment debt as required by s 3(1)(i) of the Bankruptcy Act 1967; and (ii) that the proper procedure under r 18 of the Bankruptcy Rules 1969 had not been complied with. The issue was whether the affidavit had complied with s 3 of the Act.

**Held**, the affidavit was ineffective and bad in law and no affidavit under r 95 had in fact been filed.

(1) The affidavit did not disclose that the judgment debtor had a counterclaim, set-off or cross demand which equaled or exceeded the amount of the allocatur sum ordered to be paid. Accordingly, the affidavit could not operate as an application to set aside the bankruptcy notice within the contemplation of s 3(1)(i) of the Bankruptcy Act 1967.

(2) As the judgment debtor was objecting to the bankruptcy notice on the ground that he had not been served with a sealed copy of the bankruptcy notice, he should have filed a notice of motion supported by an affidavit as required by r 18.

**Per curiam:**

Since the amendment of r 18 of the Bankruptcy Rules 1969 by the Bankruptcy (Amendment) Rules 1993 (which came into effect on 1 April 1993) the procedure to be adopted now is by way of summon-in-chambers supported by affidavit instead of notice of motion supported by affidavit.

A **[Bahasa Malaysia summary**

Notis kebankrapan telah disampaikan kepada penghutang penghakiman pada 28 Januari 1992. Pada 31 Januari 1992 penghutang penghakiman memfailkan afidavit bantahan ('afidavit tersebut') untuk mengetepikan notis kebankrapan mengikut k 95 Kaedah-Kaedah Kebankrapan 1969 B atas alasan bahawa penyampaian notis kebankrapan itu adalah tidak betul dan tak sah kerana ia hanyalah salinan yang disahkan benar dan bukan salinan yang dimeterai bertentangan dengan kk 97 dan 109 Kaedah-Kaedah Kebankrapan 1969. Pemiutang penghakiman, bagaimana pun, menegaskan bahawa afidavit tersebut sepatutnya ditolak atas alasan: (i) bahawa ia tidak menunjukkan bahawa C penghutang penghakiman mempunyai tuntutan balas atau tolakan yang sama dengan atau melebihi jumlah hutang penghakiman seperti yang dikehendaki oleh s 3(1)(i) Akta Kebankrapan 1967; dan (ii) bahawa prosedur yang wajar di bawah k 18 Kaedah-Kaedah Kebankrapan 1969 tidak dipatuhi. Isu adalah sama ada afidavit tersebut D telah mematuhi s 3 Akta tersebut.

**Diputuskan,** afidavit tersebut adalah tidak berkesan dan tidak betul di sisi undang-undang dan tidak ada afidavit di bawah k 95 yang difailkan:

(1) Afidavit tersebut tidak mendedahkan bahawa penghutang penghakiman mempunyai tuntutan balas atau tolakan yang E sama dengan atau melebihi jumlah alokatur yang diperintahkan kena dibayar. Ekoran dari itu, afidavit tersebut tidak boleh beroperasi sebagai permohonan untuk mengetepikan notis kebankrapan dalam jangkaan s 3(1)(i) Akta Kebankrapan 1967.

(2) Oleh kerana penghutang penghakiman membantah terhadap F notis kebankrapan atas alasan bahawa beliau tidak disampaikan dengan salinan notis kebankrapan yang dimeterai, beliau sepatutnya memfailkan notis usul yang disokong dengan afidavit seperti yang dikehendaki oleh k 18.

G **Per curiam**:

Oleh kerana pindaan k 18 Kaedah-Kaedah Kebankrapan 1969 oleh Kaedah-Kaedah (Pindaan) Kebankrapan 1993 (yang mula berkuatkuasa pada 1 April 1993) prosedur yang perlu digunakan sekarang adalah dengan cara saman dalam kamar disokong dengan afidavit sebagai ganti notis usul disokong dengan afidavit.] H

**Notes**

For cases on setting aside bankruptcy notices, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1410–1423; [1994] *Mallal's Digest* 131–132; [1995] *Mallal's Digest* 61. I

**Case referred to**

*Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298 (folld)

**Legislation referred to**

Bankruptcy Act 1967 s 3
Bankruptcy Rules 1969 rr 18, 95
Bankruptcy (Amendment) Rules 1993 r 18

*Soo Kok Loong* (*Peter Lo & Co*) for the petitioning creditor.
*Mohd Anuar Datuk Ghani* (*Anuar Datuk Ghani & Associates*) for the judgment debtor.

**Tee Ah Sing JC:** The bankruptcy notice was served on the judgment debtor on 28 January 1992.

On 31 January 1992 the judgment debtor filed an affidavit-in-opposition to the bankruptcy notice ('the said affidavit-in-opposition') under r 95 of the Bankruptcy Rules 1969 ('the Rules').

Paragraph 2 of the affidavit-in-opposition reads as follows:

> I crave leave of this Honourable Court to refer to 'TCH-1'. I am advised and respectfully state that service of the purported Bankruptcy Notice is improper and invalid as the same was only a certified true copy and not a sealed copy contrary to rule 97 and rule 109 of the Bankruptcy Rules 1969.

The learned counsel for the petitioning creditor submitted that the affidavit-in-opposition should be dismissed because, firstly, it was not an affidavit showing that the judgment debtor had a counterclaim, set-off or cross-demand. Secondly, the procedure adopted was wrong. It should be made by way of motion under r 18 of the Rules. In support the case of *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298 is cited.

The learned counsel for the judgment debtor submitted that under s 3(2) of the Bankruptcy Act 1967 ('the Act') a bankruptcy notice shall be in the prescribed form and that the form to be served shall be a sealed copy under rr 97 and 109 of the Rules.

The issue is whether the affidavit-in-opposition has complied with s 3(1)(i) of the Act.

In the case of *Datuk Lim Kheng Kim v Malayan Banking Bhd*, His Lordship Mohamed Dzaiddin SCJ (delivering the decision of the Supreme Court) said (at p 302):

> We would observe here that the above affidavit, purportedly an affidavit to set aside the bankruptcy notice, fails to follow, both in form and substance, Form No 7 of the Rules which contains the requirements of s 3(1)(i) pertaining to a debtor to 'satisfy the court that he has a counterclaim, set-off or cross demand which equals or exceeds the amount of the judgment debt' ... and which he could not set up in the action in which the judgment was obtained ...

And further at p 303, His Lordship stated:

> ... we are of the opinion that the said affidavit cannot operate as an application to set aside the bankruptcy notice within the contemplation of s 3(1)(i) of the Act, and the case should have been treated as if no affidavit under r 95 had in fact been filed.

I am of the view that the affidavit-in-opposition did not disclose that the judgment debtor has a counterclaim, set-off or cross demand which equals or exceeds the amount of the allocatur sum ordered to be paid.

As such I am of the view that the affidavit-in-opposition cannot operate as an application to set aside the bankruptcy notice.

Since the judgment debtor is objecting to the bankruptcy notice on the ground that he was not served with a sealed copy of the bankruptcy notice, he should have filed a notice of motion supported by an affidavit as required by r 18.

In *Datuk Lim Kheng Kim v Malayan Banking Bhd*, His Lordship Mohamed Dzaiddin SCJ said (at pp 304 and 305):

> Bearing in mind that this 'affidavit in opposition' was filed one month after the creditor's petition was served on him and contained multitude of grounds other than the existence of a counter-claim or set-off or cross demand, he should have made a formal application by motion supported by this affidavit in compliance with r 18, which reads:
>
> 'Applications to be made by motion.
>
> Except where these Rules or the Act otherwise provide, every application to the Court shall, unless the Court otherwise directs, be made by motion supported by affidavit.'
>
> In our opinion, failure on the part of the appellant to follow r 18 renders his 'affidavit in opposition' ineffective and bad in law because unless the court otherwise directs, challenges to the creditor's petition or bankruptcy notice other than that he has a counterclaim, set-off or cross demand which equals or exceeds the judgment debt, must be made by filing a notice of motion supported by an affidavit. Unfortunately, he has failed to do so in this case.

Rule 18 of the Rules has been amended by the Bankruptcy (Amendment) Rules 1993 (PU (A) 60/93 which came into force on 1 April 1993. Rule 18 (as amended) reads as follows:

> (1) Except where these Rules or the Act otherwise provide, every application to the Court shall, unless the Chief Justice otherwise directs, be made by summons in chambers supported by affidavit.

Since 1 April 1993 the procedure is by way of summons-in-chambers supported by affidavit instead of by notice of motion supported by affidavit.

In view of the aforesaid I hold that the affidavit-in-opposition is ineffective and bad in law.

*Order accordingly.*

Reported by Richard Leung